STATE OF MICHIGAN

COURT OF APPEALS

DEBBIE LASHER, Personal Representative for the Estate of BERNICE BURNS, Deceased,

Plaintiff-Appellant,

v

ROD R. WRIGHT, D.P.M.,

Defendant-Appellee.

UNPUBLISHED
December 27, 2007

No. 268975
Iosco Circuit Court
LC No. 00-002622-NH

Before: Donofrio, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Plaintiff appeals as of right the denial of her motion for judgment notwithstanding the verdict (JNOV) or new trial in this medical malpractice action. We affirm.

This is the third time this case is before us. After a jury returned a verdict in favor of defendant and judgment was entered, plaintiff filed a motion for JNOV or new trial. The trial judge, Judge J. Richard Ernst, granted the motion, and the subsequent order was signed by Judge William F. Myles after Judge Ernst's retirement. Defendant then filed a motion for reconsideration, challenging Judge Ernst's findings of fact as premised on a faulty memory regarding the testimony of defendant's podiatry expert. Judge Myles agreed with defendant and explained that, after review of the actual testimony of defendant's podiatry expert, Lawrence E. Woodhams, D.P.M., he concluded that Judge Ernst's findings of fact were clearly erroneous.

Thereafter, on February 11, 2003, the court entered an order granting the motion for reconsideration and vacating the previous grant of a new trial. Plaintiff appealed. This Court dismissed the appeal for lack of jurisdiction, no final order having been entered. *Lasher v Wright*, unpublished order of the Court of Appeals, entered May 20, 2003 (Docket No. 246995). On August 29, 2003, the trial court entered an order denying plaintiff's motion for JNOV or new trial. Plaintiff appealed. This Court held that Judge Myles had not reviewed the entire record before granting the motion for reconsideration and, thus, reversed "the trial court's decision to grant defendant's motion for reconsideration and vacate[d] the trial court's orders of February 11, 2003 and August 29, 2003." *Lasher v Wright*, unpublished opinion per curiam of the Court of Appeals, entered May 17, 2005 (Docket No. 250954) [*Lasher I*]. On remand, Judge Myles examined the entire record and, on February 16, 2006, entered an order, again, denying plaintiff's motion for JNOV or new trial. This appeal followed.

Plaintiff first argues that the circuit court was precluded from reconsidering the original grant of its motion for a new trial by the law of the case doctrine in light of this Court's May 17, 2005, opinion. We disagree. Plaintiff did not raise this issue during the remand proceedings; accordingly, this issue is not preserved for our review. See *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005).

But, even if plaintiff had not abandoned this claim on appeal we would find that it is without merit. See *id*. at 96. "The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue." *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). In this case, our May 17, 2005, opinion explicitly indicated that we did not "reach the underlying issue of whether plaintiff is entitled to a directed verdict or a new trial." *Lasher I*, *supra* at p 4. Thus, there was no ruling by this Court that the trial court was bound to follow on remand with regard to the disposition of plaintiff's motion for JNOV or new trial. And, contrary to plaintiff's argument, this Court clearly did not remand the matter for "a new trial only." In sum, the trial court was not precluded from reconsidering plaintiff's motion for JNOV or new trial by the law of the case doctrine.

Next, plaintiff argues that the trial court abused its discretion when it denied plaintiff's motion for a new trial. Again, we disagree. A trial court's decision whether to grant a new trial is reviewed for an abuse of discretion. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001).

"Proof of a medical malpractice claim requires the demonstration of the following four factors: (1) the applicable standard of care, (2) breach of that standard of care by the defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury." *Locke v Pachtman*, 446 Mich 216, 222; 521 NW2d 786 (1994). There are different standards for general practitioners and specialists. MCL 600.2912a. A podiatrist is considered a general practitioner, *Jalaba v Borovoy*, 206 Mich App 17, 21-22; 520 NW2d 349 (1994), and so is held to those standards, which require plaintiff to prove:

> The defendant . . . failed to provide the plaintiff the recognized standard of acceptable professional practice or care in the community in which the defendant practices or in a similar community, and that as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury. [MCL 600.2912a(1)(a)].

Here, plaintiff claimed that a new trial was warranted because the verdict was against the great weight of the evidence. See MCR 2.611(A)(1)(e); *Domako v Rowe*, 184 Mich App 137, 144; 457 NW2d 107 (1990). But, as the circuit court correctly noted, there was conflicting expert testimony regarding the question of whether the standard of care was breached, making that issue a question of fact for the jury. Plaintiff's podiatry expert, Steven Glickman, D.P.M., testified that defendant violated the standard of care for a podiatrist. Defendant's podiatry expert, Dr. Woodhams, testified that defendant did not violate the standard of care. Dr. Woodhams did testify that "one thing that I wished . . . [defendant] would have done is to take a bit more of the toe, because then, of course, it would have been a total success." But, contrary to plaintiff's argument, this is merely a view of the matter taken in hindsight based on subsequent events not a declaration that the standard of care was breached. Moreover, Dr. Woodhams

explained that the only reason he would have taken more of the toe was to deal with the decedent's pain. Further, what an individual doctor would like to have done does not establish the standard of care or its breach. And, to the extent that plaintiff is claiming that defendant—a podiatrist—was required to present expert witness testimony in the area of infectious disease, that argument fails.

A jury's verdict that is supported by competent evidence should not be set aside. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999). In this case, the jury explicitly found that there was no breach of the standard of care and thus no negligence by defendant. There was sufficient basis for the jury's verdict; thus, the trial court could not substitute its judgment for that of the jury. See *id*. Therefore, the trial court did not abuse its discretion when it denied plaintiff's motion for a new trial.

Affirmed.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ Mark J. Cavanagh